International Union of Operating Engineers, Local Union No. 406, AFL–CIO *and* Lloyd E. ''Sonny'' Mason *and* Laborers International Union of North America, Professional Employees Local Union No. 693

International Union of Operating Engineers, Local Union No. 406, AFL–CIO (Boh Brothers Construction Co., Inc.) *and* James Madison White

International Union of Operating Engineers, Local Union No. 406, AFL–CIO (International Maintenance Corporation and Charles Miller Construction Co., Inc.) *and* Joseph Robert Ezell. Cases 15–CA–12226, 15–CA–12227, 15–CB–3936, and 15–CB–3941

June 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On March 8, 1995, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Charging Party, Laborers' International Union of North America, Professional Employees Local Union No. 693, filed exceptions and a supporting brief.[1] The Respondent, International Union of Operating Engineers, Local Union No. 406, filed an answering brief to the Charging Party's exceptions, to which Charging Party Mason responded.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Union of Operating Engineers, Local Union No. 406, Lake Charles, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The exceptions were limited to the judge's dismissal of the allegation that Bennie Seal was unlawfully discharged.

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Charles R. Rogers, Esq., for the General Counsel.
Louis L. Robein, Jr., Esq., of Metaire, Louisiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. On charges filed by Lloyd E. (Sonny) Mason, an individual, and Laborers International Union of North America, Professional Employees Local Union No. 693 (Charging Party or Local 693), a consolidated complaint issued on September 3, 1994, alleging that International Union of Operating Engineers, Local Union No. 406, AFL–CIO (Employer, Respondent, Union, or Local 406), discriminatorily discharged employee Bennie Seal in violation of Section 8(a)(3) of the Act and also discharged Supervisor Sonny Mason in violation of Section 8(a)(1) of the Act for refusing to discharge Seal. On charges filed by James White and Joseph Ezell, both individuals, a consolidated complaint issued on June 29, 1994, alleging that Local 406 refused to refer Ezell for employment in violation of Section 8(b)(2) of the Act and, further, that Respondent violated Section 8(b)(1)(A) of the Act by threatening employees with unspecified reprisals and also threatening and inflicting bodily harm on White for engaging in dissident union activity. By order dated June 29, 1994, these cases were consolidated. Answers were timely filed by Respondent. Pursuant to notice, this case was heard before me on October 11, 12, 13, and 14, 1994. Briefs have been timely filed by Respondent and the General Counsel, which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer, Local 406, is an organization engaged in the business of representing employees in dealing with employers concerning wages, hours, terms, and conditions of employment. During the 12-month period ending August 31, 1993, Local 406, in conducting the operations described above, received dues and initiation fees in excess of $50,000 and remitted from its New Orleans facility to its Washington, D.C. facility of the International Union of Operating Engineers dues and initiation fees in excess of $50,000.

Boh Brothers Construction Co., Inc., a corporation with officers and places of business in New Orleans and Lake Charles, Louisiana, has been engaged as a building and maintenance contractor in the construction industry. During the 12-month period ending May 31, 1994, Boh Brothers, in conducting its business operations described above, purchased and received at its Louisiana facility goods valued in excess of $50,000 directly from points outside the State of Louisiana.

International Maintenance Corporation, a corporation with an office and place of business in Baton Rouge, Louisiana, and a construction jobsite in Sulphur, Louisiana, has been engaged as a maintenance contractor in the construction industry doing industrial construction and maintenance. In the 12-month period ending May 31, 1994, International, in conducting its business operations described above, purchased and received at its Sulphur jobsite goods valued in excess of $50,000 directly from points outside the State of Louisiana.

Charles Miller Construction Co., Inc., a corporation with an office and place of business in West Lake, Louisiana (West Lake jobsite), has been engaged as a pipeline contractor in the construction industry doing industrial construction

and maintenance. During the 12-month period ending May 31, 1994, Miller, in conducting business operations described above, purchased and received at its West Lake jobsite goods valued in excess of $50,000 directly from points outside the State of Louisiana. The complaints allege and the answers admit that the above-named Employers, including Local 406, are employers within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The complaint alleges, the answer admits, and I find that Charging Party Local 693 and Respondent Local 406 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE EMPLOYER'S UNFAIR LABOR PRACTICE ALLEGATIONS

A. *Facts*[1]

1. Discharges of Sonny Mason and Bennie Seal

The Respondent, Local 406, is a statewide local union of about 3000 members with headquarters in New Orleans and district offices in various localities, including Lake Charles, Louisiana, with about 475 members in the Lake Charles district. The Union's hierarchy in New Orleans consists of Peter Babin III, business manager and financial secretary, who has overall responsibility for the operation of Local 406. Don Schiro is president and pipeline business agent for Pipeline Construction. Carter Carpenter is vice president and business agent for the Baton Rouge district. Rayford Cloy is business agent for the New Orleans district and recording corresponding secretary of Local 406.

It appears that all of the business agents report directly to Babin, including Schiro, Carpenter, and Cloy who also hold union office. Sonny Mason was the business agent for the Lake Charles district. Mason had no reporting responsibility except to Babin. In 1985, Sonny Mason had been a member of Local 406 working in the pipeline industry. At that time, Mason was recommended by his friend, Schiro, for the position of business agent in the Lake Charles district to replace the previous business agent, Willard Carlock, whose administration had been tainted by allegations of sexual misconduct involving the trading of job referrals for sex. At the time of the alleged misconduct, Carlock employed both his wife and a girlfriend in the district office. These revelations were the subject of various inquiries in the United States Senate by the Senate Labor Committee. Subsequently, lawsuits were also filed that included allegations that preference in job referrals was being given to members contributing to a legal defense fund supporting Carlock, who had been charged with the misconduct.

In October 1985, Mason was interviewed by Babin, Schiro, and Cloy in the conference room of the New Orleans office about his employment to replace Carlock. It is undisputed that Babin wanted to avoid any recurrence of the Carlock scandal. Based on the corroborated testimony of these witnesses, which I credit, Mason was told by Babin, inter alia, in referring to the problems involving Carlock's regime, that if he were to be hired, he would not be allowed to hire as employees in the Lake Charles district office either the wives or girlfriends of members. It does not appear that there exists any written prohibition against such employment. Babin conceded that Local 406 did at one time employ some of his relatives in various capacities. His mother and a cousin had been office employees. His mother left in about 1973 and his cousin in the mid-1980's.

Mason concedes that he was interviewed but testified that he was told either by Babin or Schiro only that they would prefer that he not hire his wife or the wives of union members as employees. The corroborative testimony of Babin, Schiro, and Cloy persuades me, however, that the prohibition included girlfriends, and that Mason accepted this condition of employment.

In late October 1985, Mason was hired as business agent for the Lake Charles district. At the time of his employment, Mason was married, and the office secretary was a woman named Jackie Trussclair. In July 1988, however, Mason discharged her and hired Bennie Seal. Mason and Seal were admittedly engaged in an intimate relationship.

Schiro testified that prior to Seal's employment, Mason had disclosed to him that he was having a sexual relationship with Seal and intended to hire her as an office secretary. Schiro testified that he warned Mason that he knew the rules and was aware of the problems that the Lake Charles office had experienced under Carlock.

Over the next years, it appears that Mason and Seal, as a couple, attended several union and political functions also attended by officers of Local 406, including Babin, and Babin testified that he did suspect the existence of a personal relationship, particularly in November 1991 when he received requests for verifications of employment from a home mortgage lender for both Seal and Mason related to a home mortgage. Babin raised the question with Mason at that time but was assured by Mason that he was simply cosigning the loan as a friend and denied any personal relationship.

Babin testified that his suspicions of a personal relationship were aroused again in July 1992 when Seal rejected a small raise as inadequate.[2] Babin found this rejection embarrassing and, when he discussed it with Mason, discovered that Mason was supporting Seal, saying that she needed and deserved more money than the raise Babin was attempting to give her. Babin again inquired if Mason and Seal were hav-

[1] There is conflicting testimony regarding some of the allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically on their demeanor and make my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco, Inc.*, 159 NLRB 1159, 1161.

[2] According to Seal, during a telephone conversation with Babin about refusing the raise, she asked about joining Local 406 and was told by Babin that he had taken a personal oath not to allow secretaries into the Union. Babin denies having made any such statement, and, having reviewed the relevant testimony, I conclude that Babin's testimony is credible and that the statement was not made.

ing a personal relationship because it looked personal to him, but once again Mason denied it.

It is undisputed that Schiro was aware of the relationship between Mason and Seal from the beginning, but did not mention it to Babin because, as he testified, he was a friend of Mason and did not want to see him get into trouble. Schiro also testified that about a year before Seal's dismissal, he raised the issue again with Mason, who assured him that the relationship had ended at that point, and that Seal was returning to her husband and would be leaving her union employment within a few weeks. This did not happen.

In June 1993,[3] a decision was made to give all of the business agents a raise of $1000 per year, amounting to a net raise of about $20 per week. Schiro, fearing that Mason, like Seal, would reject the raise, arranged a meeting with Mason at the Pit Grill in Lake Charles on June 8. Schiro urged Mason to accept the raise. Mason said that as the financial condition of the Union was poor and as dues had just been raised, he was not disposed to accept the raise. According to Mason, Schiro also told him that Mason was going to have fire Seal because Babin did not want to negotiate with another local union over a secretary. Schiro denies that there was any discussion about Seal's affiliating or joining the Union, or her discharge at this meeting. Having carefully reviewed the entire record, I conclude that Schiro's account was the more credible.

Nonetheless, shortly thereafter, Mason called the bookkeeper in the New Orleans office and told her that he was rejecting the raise and would be returning the raise that had appeared in his check. This created a problem in bookkeeping because the raise had already been programmed into the computer. The bookkeeper spoke to Babin about the matter and Babin, somewhat angered and embarrassed, directed Schiro to arrange a meeting with Mason

This meeting was held on June 17 in Jennings, Louisiana, attended by Babin, Schiro, and Mason. At this meeting, Babin made it known to Mason that word of his refusing the raise had gotten around the Union and that he had been embarrassed by Mason's rejection of the raise. Babin called Mason's attention to the policy prohibiting business agents from employing wives or girlfriends as office secretaries and said that with both of them looking for a home mortgage,[4] and both turning down raises, he wanted to know if a personal relationship existed between Mason and Seal. For the first time, Mason admitted to Babin that he and Seal did have a personal relationship and, in fact, were engaged and intended to get married. Babin told him that in view of the policy, the relationship between Mason and Seal could not be tolerated within the Union and that Seal would either have to quit or be fired. Babin made it clear that it was Mason's responsibility to take care of the situation. Mason said that he would not fire her. But Babin told Mason to let him know his final decision by the following Monday.

On June 21, Mason called Local 406 headquarters in New Orleans and spoke to Babin. Unknown to Babin, this conversation was being taped by Mason. During the conversation, Mason suggested that Seal was going to resign her employment and questioned Babin about whether or not Seal was entitled to the return of certain pension-benefit contributions. Mason also asked why Seal had to be laid off and Babin replied:

> Because of the arrangement that they have in the office and I'm not going to rehash that with you. I didn't want it to start off with, I don't want it now and I and I I've put up with it because of some—of your work and it took me longer than what it should have, it should never have started because it's just dead against my policies and I will try to work with you as much as I can because like I told you, it's nothing personal against you. But let me look into the other thing.

Seal did not resign, however, and because Mason had not discharged her it became necessary, according to Babin, to discharge both of them. Babin testified that it was necessary to fire Mason as well as Seal in order to avoid any appearance of gender-based discrimination against Seal because both were involved in the relationship.

On June 30, Schiro and Carpenter appeared at the union hall in Lake Charles at the direction of Babin for the purpose of discharging Mason and Seal and to temporarily take over the affairs of the Lake Charles district office. Letters dated June 29 were presented to both Mason and Seal and signed by Babin. The letter given to Seal, read, inter alia:

> Effective immediately upon receipt of this letter on June 30, 1993. Your [sic] are terminated as an employee of Local 406.
>
> I regret that this action had to be taken.
>
> As explained to you earlier by another officer of this Local Union, the Union must enforce its ''no fraternization'' rule. Your direct supervisor, Sonny Mason, has similarly been apprised of this policy and will be subjected to a similar application of this policy.
>
> You will be issued a final paycheck, as well as accrued vacation, within the time established by law.

The letter given to Mason reads, inter alia:

> Please be advised that effective immediately upon receipt of this letter you are terminated as Business Agent of this Local Union at its Lake Charles office. As you know, you are being terminated because of your failure to correct a continuing violation of this Local's ''no fraternization'' policy.
>
> Checks representing pay earned through the end of the payroll period, as well as accrued vacation, will be issued to you within the time established by law.
>
> Please return all keys, credit cards and other property of Local 406 to either D. Schiro or Carter Carpenter, who will assume responsibility for the administration of the Lake Charles office.
>
> I regret that this decision had to be made. But, as I explained to you earlier, I must seriously enforce this important policy for the good of the Local Union.
>
> Your refusal to cooperate in this regard can simply not be tolerated.

According to Seal and Mason, both Schiro and Carpenter, when questioned, admitted that they were not aware of any

[3] All dates refer to 1993 unless otherwise indicated.

[4] Although Mason denied that the matter of a mortgage application work verification form was mentioned, I credit the corroborated accounts of Babin and Schiro that it was.

''fraternization'' policy. Schiro, however, whose testimony based on the record as a whole I found to be more credible, states that he was asked only if there was any written policy and he replied that there was nothing in writing that he was aware of; not that no rule existed. After an accounting of the funds of the Union, both Mason and Seal left the union office. Schiro, whose testimony I found credible in this regard also, states that Mason himself observed that he was being fired for rejecting a pay raise, and that Schiro replied, ''that's probably a part of it.''

At a meeting of the union membership on October 19, Mason mentioned the subject of his raise. As the minutes disclose:

> Brother Mason asked if he had a right to turn down a raise. We said yes, he had that right. Brother Mason stated, ''I was fired by Brother Babin because I turned down a pay raise he granted to me and I embarrassed him by doing that. That's why I was fired.''

With respect to the matter of Seal's union activities and the Respondent Union knowledge thereof, it appears that in about March 1993, Rodney Sonnier, business manager of Laborers Local Union No. 693, came to see Mason at the union hall. While he was there, Seal spoke to him, telling him about her dissatisfaction with the small raise she had been given and had rejected, and inquiring about the possibility of representation by Local 693 and asked what she would have to do. Sonnier told her that she needed to sign an authorization card in order for him to seek recognition for her.

Thereafter, Sonnier also raised the matter with Mason who told him that he was a union member and that everyone had a right to be a union member. On or about April 28, Sonnier and Seal met for lunch and Seal signed an authorization card for Local 693 with the understanding that the card would be held and nothing done until after the nominations for office for Local 406 were held at the end of April or early May.

Because Sonnier was unsure of the procedures for representing a single employee, he called the New Orleans office of the National Labor Relations Board and was advised that while an election could not be held, Local 693 could represent a single employee. With this information, Sonnier concluded that Local 693 would also have to bargain with Local 406 on Seal's behalf.

After the nominations, Sonnier called Babin and told him that he had a secretary who wanted to be represented and asked about taking Seal into Local 406. According to Sonnier, he was advised by Babin that Local 406 was not ''structured'' to have one secretary as a union member but that they could talk about it. Babin testified that he told Sonnier that Local 406 was a statewide Union and that he needed to see an authorization card. Babin further questioned the feasibility of bargaining for a one-person unit but agreed to talk about it.

Later, Sonnier approached Babin about the matter while both were attending a session of the state legislature in Baton Rouge. Babin referred him to Louis Robein, labor counsel for Local 406, for further discussion. Sonnier called Robein who confirmed that Babin had authorized him to handle the situation. They discussed the problem, including the possibility of Seal going into Local 406. Thereafter, Robein and Sonnier spoke several times on the telephone but nothing was resolved. In about mid-June, Sonnier heard from Seal that someone was being sent to discharge her. Thereafter, he solicited and, on June 21, obtained a second authorization card from another secretary in the Shreveport office. He also told her that in view of Seal's pending discharge, however, he would hold the card, but he nonetheless called Robein to tell him that he had another authorization card. Robein asked from which office the authorization card had come, but Sonnier declined to tell him.

After consulting the Laborers International Union in an effort to resolve the matter, Sonnier filed an unfair labor practice charge against Local 406 on July 22, 1992.

2. The 8(b)(1)(A) and (2) allegations—Joseph Ezell

Joseph Ezell was a longtime (15 years) member of Local 206. As noted earlier, Local 406 maintains two referral lists. One list is for applicants of the pipeline industry, which is maintained on a statewide basis from New Orleans where it is managed by Schiro, and the second list is the building trades list, which is maintained locally in the district offices, including Lake Charles, and from which referrals are made to the local building trades contractors in the area. Ezell worked from the building trades referral list.

At the time Mason was fired on June 30, Ezell went to the union hall where he spoke to Schiro, wanting to know what had happened. He was told by Schiro that the union hall was not closing and that he needed to hear ''their'' side of the story. Ezell also spoke to Mason who told him that he and Seal were fired because he had refused to hire Seal.

At about this time, Ezell told Schiro that a special meeting should be held to discuss the matter and Schiro said that a regular quarterly meeting was coming up within a couple weeks during the week of July 4, where the matter could be discussed. That meeting, however, and all other district meetings scheduled for that time were canceled because of the holiday and other commitments of union officers. The next regularly scheduled quarterly meeting would be held in October.

By letter to Babin dated July 9, members of Local 406 requested that a ''special call'' meeting be set immediately and attended by Babin because the regular July meeting had been canceled. The purpose of the meeting was ''to address the membership regarding the termination of our business agent Sonny Mason, in the Lake Charles-Lafayette district.'' By letter dated July 19, Babin responded to Ezell's request and advised him that the request for a special meeting did not meet the requirements of the bylaws of Local 406 and that no decision on a special meeting would be made until those requirements were met.[5] It appears that prior thereto, however, a proper request had been made by letter dated July 16. A ''special call'' meeting of the membership of Local 406 was held on August 19.

The special meeting was attended by about 100 members. It was limited to the subject of Mason's discharge. Babin read a statement saying essentially that after he became aware that the ''no fraternization'' rule was being violated by

[5] The bylaws of Local 406 require that a petition for a special meeting must be signed by at least 10 percent of the membership in good standing residing in the district, stating the purpose of the meeting; further, that no other business shall be transacted at this meeting.

Mason and Seal, Mason had been given ''time to work this out. He chose not to.'' Further, that in order not to show sexual discrimination, it was necessary to discharge both Mason and Seal.

On the following day, August 20, in a letter to Babin signed by Ezell, another request for a special meeting was made. This letter protested the cancellation of the regular quarterly meeting in July and requested that a meeting to discuss ''any and all problems'' of the membership. The letter also expressed the conviction that this discussion could not wait until the next scheduled quarterly meeting in October 1993. Nonetheless, by letter dated September 16 from Schiro to Ezell, the request was denied due to the travel commitments of those who would have to attend.

Ezell also testified that sometime in July after Mason and Seal were discharged, he and Schiro were discussing a referral problem. During this conversation, Schiro raised the matter of Ezell's efforts by way of meetings and circulating petitions seeking reinstatement for Mason. Schiro told Ezell that he was rocking the boat too hard and that he did not realize the power that Babin had in both Louisiana and the county.

Schiro recalled a conversation with Ezell wherein Ezell asked what he thought about the situation but only expressed the conviction that Mason would not be back and he did not say anything to Ezell about waves or rocking the boat. Based on a review of the pertinent probative testimony, I conclude that Ezell's testimony concerning the conversation is more accurate and I credit that account.

With respect to the matter of the alleged discriminatory refusals to refer, it appears that on October 29, Ezell was laid off and went to the union hall to register on the out-of-work referral list. As he had done in the past, he filled out a work reference card listing the types of jobs that he was qualified to perform on referral, with boxes to be checked beside the various jobs. This record discloses two work reference cards dated October 29, both apparently signed by Ezell. Both appeared to have been signed by Ezell but are different in content, listing somewhat different types of jobs. The box checked ''motor patrols'' is checked on one, but the ''motor grader'' category on the second, although this is the same type of work, is not checked.[6] The normal procedure is then for the business agent, in this case newly appointed Business Agent Wilbert ''Bish'' LeJuene, to make up an out-of-work list containing information previously submitted on the work referral card. All this information, however, does not appear on the posted out-of-work list of union members. Only the out-of-work date, name, and telephone number appear thereon as posted.

When a job became available on November 18 with Charles Miller Construction Co., a union member operating engineer named J. W. Shay was referred to the job by LeJuene despite the fact that Shay did not come onto the out-of-work list until November 6, a week after Ezell.

On November 22, having learned that Shay had been sent to the job, Ezell went to the union office to speak to LeJuene when LeJuene explained that Shay was sent out ahead of Ezell because the job required road grader skills and Ezell had not checked off ''motor grader'' on his work reference card and LeJuene was unaware that he could do that job. LeJuene then retrieved the work reference form dated October 29, 1993, showing that the ''motor grader'' box had not been checked and showed it to Ezell by way of explanation. LeJuene also changed the job out-of-work list to reflect Ezell's ability to do this work and on the same day, November 22, referred Ezell to A. D. Ballad Construction Company as a dozer operator.

On December 7, the A. D. Ballad job finished and both Ezell and George Duhon, another union member, were laid off. Ezell went to the union hall to register on the out-of-work list. Ezell testified that while he was there, he filled out another work referral card and was making out a check for his union dues when Duhon called. The office secretary, Martha Spell, took the work referral card information over the telephone from Duhon. Ezell remarked to her, ''Since when do we put our name on the list by phone. We have never been able to do that,'' and Spell replied, ''I do it for everyone.''

On December 8, a union member previously referred to International Maintenance Corporation jobsite called Ezell to ask if he was working there. Ezell said no and was told that Duhon was working there.

Ezell felt that he should have been placed on the referral list and referred ahead of Duhon and went to the union hall on December 9 to speak to LeJuene about the matter. LeJuene explained that Duhon was sent because he was ahead of Ezell on the referral list. Ezell complained that he had already signed his work referral card when Duhon called and was writing a check for his dues. LeJuene said that his records showed that Duhon's name preceded Ezell's. LeJuene testified that he had looked into the matter and was told by Spell that Ezell came in while she was filling out a work reference card for Duhon over the phone. According to LeJuene, it was for this reason that Duhon was placed ahead of Ezell when the job referral list was made up. LeJuene inquired of business agents at the other district offices about their policy on calling in to be placed on the out-of-work list, and all told him that it was allowed and that it was not necessary to appear in person.

It was stipulated that thereafter Ezell was referred by the Union to jobs on February 9 at Nichols Construction Company and on March 1, 1994, to Boh Brothers Construction Company.

The record also discloses with respect to the matter of calling in, that with respect to the building trades out-of-work list, there exists a document captioned, ''LOCAL 406 INTERNATIONAL UNION OF OPERATING ENGINEERS HIRING PROCEDURES.'' In relevant part, these procedures read:

> 1. All applicants must have their names and telephone numbers placed on the current out of work list in the district of their choice.
>
> 2. Each applicant must indicate on a work reference form to be supplied by Local 406 his qualification so that this information may be entered on the current out of work list.

These procedures do not require the personal appearance of a member to sign the out-of-work list. Mason testified, however, that under the administration of Carlock and then himself, it was the policy to require members of the Lake Charles district to register personally at the office to be

[6] A prior work reference from dated June 4, 1992, also shows ''motor patrols'' not checked off.

placed on the out-of-work list and further that he was told by Babin at the time he was hired that this was the policy to be followed. Babin, whose testimony I credit in this respect, testified that he did not tell Mason that it was necessary for members of the Lake Charles district to appear personally for registration on the out-of-work list. Further, it appears, as noted above, that all of the other districts allowed members to call in and be placed on the building trades out-of-work list.

Carpenter and Schiro testified that on June 30, when they came to Lake Charles to take over the office, they were not aware of any policy requiring the personal appearances of members in order to be placed on the out-of-work list and that, in fact, they took and placed several members on the out-of-work list based on telephone calls pursuant to their understanding of how the referral procedures operated in the other districts within Local 406.

3. The 8(b)(1)(A) allegations—James White

a. *Threats*

It appears that White, Mason, and Seal were friends. When Mason and Seal were fired on June 30, White went to the union hall and assisted them in their departure. Later, over a period of about a month and a half, White circulated a written petition in various segments of the community and labor movement, including the District Attorney's office, construction sites, and the Local Building Trades Council, asking for Babin to reconsider Mason's discharge based on his performance and value to the Union and obtained about 150 names on the petitions.

Sometime in July, White and another union member appeared at the union hall circulating these petitions. When Schiro inquired what they were doing, White responded by giving Schiro a copy of the petition. Schiro then remarked that they should not be making waves like that because they were looking for a new business agent and it could be one of them. White laughed and then responded that Mason had helped them and now they were going to try to help him.

Also in July, White was referred to Boh Brothers as an operator and was made a foreman about 3 weeks later. The job was expanding and needed additional operators. The job superintendent, Sal Pepitone, had called the union hall for eight operators and also asked White to go to the union hall to see that they were ''all lined up and that we had the type of people we wanted and that they were all drug tested and they were all ready to go.'' In late July or early August, White went to the union hall and spoke to Schiro and LeJuene. At this meeting, Schiro told White that he could not be loading up the job with his friends and that all the operators would be referred from the out-of-work list. Schiro told White that he could be brought up on charges if he tried to break the rules by having friends get the work and Schiro also said that Babin and Robert Boh, the contractor, were friends and that if he did not watch out, Babin would call Boh and White would not like the results of the conversation. Schiro denied saying this. Schiro testified that he had learned that the union hall had received a call from Pepitone about the need for additional operators and that Pepitone had said that White had remarked to him that the Union would not be able to supply the operators. According to Schiro, he only admonished White not to represent to contractors the Union's incapacity to provide operators and that any other conversations with White were only an exchange of pleasantries. Although Schiro generally denies making any such coercive admonitions to White, a review of the probative testimony persuades me that White's accounts of these two conversations should be credited.

b. *Altercation with LeJuene*

In August 1993, Brandon Walker was referred by LeJuene as an apprentice to Boh Brothers where he worked with White. The matter of Walker's referral was raised by White at the regular meeting which, as noted earlier, was held on October 21. At this meeting, White inquired about why the sons of union members would not have been referred to the job from among the apprentices on the apprentice list rather than Walker who was not the son of a member. LeJuene explained that he had tried to call the son of a member, Donald Cauthon, but was unable to reach him. LeJuene testified that he felt that members' sons should have priority for getting into the apprenticeship classes but, once in the class and put on the list for referral, they should be referred in the order they appeared on the list and that is what he had done. The son of Joseph Ezell was also on the list, but his name appeared below Walker's and thus was not referred.

On the following day, LeJuene went to the Boh Brothers' jobsite. He testified that the purpose of the visit was to explain to White that he had not deliberately passed over any member's son on the list. At the jobsite, LeJuene got together with White and Walker in the timeclock shed. LeJuene began to explain how Walker had been referred, i.e., that LeJuene had just gone down the list by dates of application. White disagreed, taking the position that members' sons should be given priority regardless of their place on the apprenticeship list. LeJuene then directed White to tell that to Walker. As White turned toward Walker, he was struck on the side of the head by LeJuene who testified that he ''lost his cool'' when White put a finger into his face and said that because of S.O.B.'s like LeJuene, the Union was going downhill. White denied either using profanity or having put his finger in LeJuene's face. In this regard, I credit White's account, corroborated by Walker, that White did not have his finger in LeJuene's face, nor do I credit LeJuene's recital of profanity, noting particularly that Walker's detailed account of the incident does not disclose the use of any profanity by White.

B. *Discussion and Analysis*

1. The discharges of Mason and Seal[7]

The General Counsel contends that Seal was discharged for her union activity and that Mason was discharged for re-

[7] In its answer, Respondent argues that as a managerial employee, Seal is not entitled to the protection afforded employees under the Act. The record discloses that Seal performs traditional secretarial functions, including typing, answering telephone calls, making written reports, and taking dues payments from union members. The record also discloses that occasionally, when employers need immediate referrals and Mason is not in the office, she would contact him by car phone and, if so instructed, go down the out-of-work list to locate eligible members. Thereafter she would recontact Mason who instructed her on what to include on the referral slip and authorized her to sign his name on the referral. In my opinion, because the

fusing to unlawfully discharge Seal. In my view, the facts do not establish that contention.

The Act is designed to protect the rights of employees. Supervisors, like Mason, are normally not entitled to protection against discrimination, including discharge, for having engaged in union or protected activity. In circumstances, however, when supervisors are discriminated against for refusing to discharge employees for reasons that are unlawful under the Act, such discrimination is deemed unlawful in violation of Section 8(a)(1) of the Act.

Mason was hired to replace a corrupt business agent to run the Union. Babin felt that it was in the interest of the Union for business agents, including Mason, not to hire their wives, girlfriends, or relatives as employees of the Union. Although this hiring policy was never reduced to writing, Mason was made aware of it at the time he was hired, and he accepted it as a condition of his employment.

Nonetheless, Mason and Seal became romantically involved. Despite the prohibitions of the hiring policy, Mason terminated the incumbent office secretary, and hired Seal. Schiro was fully aware of this relationship but, as Mason's friend, decided not to tell Babin. Certain events, however, did cause Babin to suspect a personal relationship between Mason and Seal, i.e., the mortgage loan employment verification and, later, Mason's support for Seal when she rejected a raise. At those times, on inquiry by Babin, Mason denied any personal relationship between himself and Seal.

Mason's denials continued until about June 1993 when Mason, like Seal, rejected a raise, an event that caused Babin embarrassment within the Union and also caused him to suspect that they were making common cause against him, and were engaged in a personal relationship.

At a meeting on June 17 Babin confronted Mason directly. He recited the basis for his suspicions and Mason admitted, for the first time, that he and Seal had a personal relationship and had plans to be married. Babin reminded Mason of the hiring policy and told him that it would be his responsibility to correct the situation. He gave Mason time to secure Seal's termination, either by resignation or discharge. The General Counsel argues that this relationship had been condoned by Babin as he was aware of it and did nothing about it until Seal's alleged union activity. In my view, while Babin's suspicions had been aroused, these suspicions had been softened by Mason's untruthful denials, and it was not until June 17, when directly confronted, that Mason admitted to Babin the existence of the relationship. Also, on June 21, in the secretly taped discussion of Seal's resignation, Babin alluded to the relationship between Mason and Seal as violating the Union's policy and requiring Seal's departure in conformity to the hiring policy.

As it turned out, Seal did not resign and when Mason refused to discharge her, Babin fired them both. According to Babin, he fired Mason and Seal together, lest he be charged with gender bias in retaining Mason and firing Seal when both were parties to the relationship that was the basis for their discharges. In order for the General Counsel to prevail, it must establish that Seal was discharged because of her union activity. The credible evidence in this case, however, is insufficient to support this contention. Although it is true that Seal was seeking union representation for herself and had signed an authorization card, the credible evidence does not show that Babin opposed union representation for her, although he was dubious about representation in a one-person unit and had turned the matter over to his attorney to resolve. Discussions were in progress when the incidents giving rise to the discharges arose.

The General Counsel also argues that disparate enforcement of the no-fraternization rule is evidence that enforcement against Seal was a pretext. I do not agree. The no-fraternization rule was actually a condition of employment accepted by Mason when he was hired in 1985. This prohibition was a response to the problems experienced in the Lake Charles District during Carlock's tenure. It was prospective in nature. It prohibited Mason from hiring girlfriends and relatives. It did not require the discharge of anyone already employed.

As for Mason, the record discloses that Babin's objective was to enforce the Union's hiring policy. Had Mason acceded to Babin's directive that Mason arrange for Seal's departure either by resignation or termination, he could have retained his own employment as business agent. For whatever reason, however, Seal did not resign and Mason declined to discharge her. At this point, Babin obviously had the option of discharging Seal and retaining Mason. As noted above, Babin chose not to exercise this option but rather to fire both of them.

Although the record also discloses that Babin was irritated by Mason's deception and uncooperative attitude, the record also clearly discloses that he would have retained Mason if Mason had terminated Seal. In these circumstances, I conclude, based on the record, that Mason was discharged because Babin theorized that for him to have retained Mason while discharging Seal would have left him vulnerable to charges of gender discrimination because both were parties to same prohibited relationship.

Having concluded that neither Seal nor Mason was discharged in violation of the Act, it is unnecessary to determine what, if any, consideration should be given to Respondent's contention that their discharges were justified by post-discharge information acquired after their discharges.

In summary, I conclude that Seal's union activity was not related to her discharge and while Babin did fire Mason for not terminating Seal, her union activity was not a factor.[8] Babin fired both of them to enforce this Union's policy against hiring relatives or girlfriends. He fired Mason only because he was forced to when Mason refused to fire Seal, and because he wanted to avoid charges of gender-based discrimination against Seal.

2. The 8(b)(1)(A) and (2) allegations—Joseph Ezell

a. *Failure to refer*

It is the contention of the General Counsel that on two occasions, November 18 and December 8, that Respondent

record discloses that Seal performs basically secretarial duties, such limited, occasional, and routine referral duties are insufficient to constitute her a managerial employee.

[8] With respect to any *Wright Line*, 251 NLRB 1083 (1980), analysis, I conclude that the General Counsel has failed to make a prima facie showing sufficient to support any inference that protected conduct was a ''motivating factor'' in Respondent's decision to terminate Seal.

failed to refer Ezell for employment because he had engaged in dissident union activity in violation of Section 8(b)(1)(A) and (2) of the Act. The record discloses that Ezell was a supporter of Mason and, along with White, held meetings and contacted with Babin in an effort to secure Mason's reinstatement. The record does not support the conclusion that the failure to refer Ezell, however, either on November 18 or December 8, was caused by Ezell's dissident activity.

With respect to the November 18 incident, it is undisputed that Miller Construction Company wanted someone with ''motor grader'' skills. LeJuene's unrebutted testimony is that when he consulted the work reference form submitted by Ezell, that skill was not indicated and, therefore, he went to the next person on the out-of-work list, whose work referral form did indicate that skill and referred that person, J. W. Shay. Unaccountably, so far as this record is concerned, there appears to be two work referral forms signed by Ezell dated October 29, one indicating motor grader skills and another that does not. Ezell offered no explanation for the existence of two forms, but their authenticity was not disputed. LeJuene's undisputed testimony is that he saw only the form that did not list the motor grader skill and therefore passed over Ezell. There is nothing in the record to suggest that LeJuene deliberately ignored the work referral form showing Ezell's qualifications for motor grader work. I credit LeJuene's testimony that he was unaware that Ezell had listed any qualifications as motor grader when he made the referral of Shay and, accordingly, I conclude that his failure to refer Ezell was not related to Ezell's dissident activity on behalf of Mason.

In this regard, I also note that when Ezell called the matter to LeJuene's attention on November 22, LeJuene added the motor grader skill to Ezell's work referral form and referred him, that same day, to a job at Ballard Construction Company.

With respect to the allegation that LeJuene discriminatorily failed to refer Ezell on December 8, the record discloses only that Duhon was allowed to register on the out-of-work list by telephone. Nothing in the Union's hiring hall procedures mandates a personal appearance to register on the out-of-work list for building trades' work and, in fact, the Lake Charles district is the only district that had been requiring a personal appearance. Those in charge of referrals were unaware of this requirement and several members, prior to December 8, were allowed to register on the out-of-work list by telephone. LeJuene's unrebutted testimony, which I credit, is to the effect that Duhon was placed on the out-of-work list ahead of Ezell only because he had been informed that Ezell registered after Duhon had called. In these circumstances, I conclude that the General Counsel has not established that the failure to refer Ezell on December 8 was motivated by Ezell's dissident activity.

The General Counsel further contends, in view of the exclusive referral systems in effect under contracts with Miller Construction and IMC, that even assuming that the failures to refer Ezell were not discriminatory, they were nonetheless ''arbitrary acts'' in violation of Section 8(b)(1)(A) and (2) of the Act. See *Painters Local 1115 (C & O Painting)*, 312 NLRB 1036, 1040 (1993). Even assuming that exclusive referral provisions were in place, however, the probative facts do not support the conclusion that LeJuene acted arbitrarily. In my opinion, the General Counsel has not shown that Ezell was misplaced on the out-of-work lists. I cannot on this record conclude that LeJuene acted improperly in the placement of Ezell on the out-of-work list or in his referral.

b. *Unilateral change—hiring hall procedures*

The record discloses that physical registration on the out-of-work list was not a requirement of the Union. Nothing in the written union hiring procedures requires that this be done, even though Mason and Carlock, during their tenures as business agents, required employees to register in person on the out-of-work list. After Mason was ousted, the referrals were done by Carpenter and Schiro and later by LeJuene when he succeeded Mason. None of these people were aware of Mason's policy and allowed members to register both in person and on the telephone. In doing so, they were simply following the practice that prevailed at the other district offices and appears to be contemplated by the Union's own written hiring procedures. This was a matter that was within the authority of the Lake Charles district business agent to administer. LeJuene was not bound by the procedures of his departed predecessor, and a return to the more widely utilized practice was not unlawful as a ''unilateral change'' under Section 8(b)(1)(A) of the Act.

Having concluded that Respondent did not violate the Act by unilaterally changing hiring hall procedures, it is unnecessary to reach the contention made by Respondent that this change allegation is barred as untimely under Section 10(b) of the Act.

3. The 8(b)(1)(A) allegation—James White

The altercation

As noted above, at a meeting on the night before this incident, White had accused LeJuene, at a meeting of the membership, of bypassing relatives of members in selecting an apprentice for referral. LeJuene, a newly appointed business agent, was upset by this allegation and argued that he had gone down the list of apprentices in the order in which they appeared. His visit to White's jobsite on the following day was for the purpose of setting White straight in the presence of Walker.

In the course of attempting to convince White of the fairness of his method in selecting and apprentice, White continued to maintain the position that relatives of members should be favored regardless of their position on the apprenticeship list. LeJuene became agitated by White's disagreement and, in my opinion, LeJuene struck White out of anger and frustration at what LeJuene perceived as White's attempt to show him as disloyal to the membership for not favoring relatives in making the selection of apprentices. In short, LeJuene struck White out of anger for making him look bad in front of the membership by questioning his selection of an apprentice at a union meeting on the previous evening. In my opinion, White had the right to express a dissident view on this issue and the assault in response to that dissent violated Section 8(b)(1)(A) of the Act.

With respect to Respondent's contention that White is a supervisor, it appears that White was hired by Boh Brothers by way of referral and that he became a foreman late in July when the size of the work crews increased. This contingency was covered by the contract and White worked under the conditions set out in the contract. White did not have any

independent authority to hire or fire. Although it appears that he did direct the work activity of some five or six men for about a year, he was thereafter returned to operator status when the job slowed down and the number of operators diminished. Even though White may have temporarily exercised some authority over a work crew, this record is insufficient to warrant the conclusion that the nature of his duties constituted him a supervisor within the meaning of Section 2(11) of the Act, particularly as his employment as a foreman was temporary and his working conditions were governed by the contract during the entirety of his employment. In these circumstances, I conclude that Respondent may not claim supervisory status for White. *Birmingham Printing Pressmen's Local 55 (Birmingham News)*, 300 NLRB 1 (1990).

Further, even assuming that White was a supervisor, the attack on him was nonetheless coercive as it occurred in the presence of Walker, who was clearly an employee.

4. The 8(b)(1)(A) threats to Ezell and White

As set out above, Ezell and White were both friends of Mason opposed to his ouster and clearly engaged in a campaign to have him reinstated. Because the union hierarchy had concurred in the discharge of Mason, it can fairly be said that the activities of Ezell and White were an opposition viewpoint and dissident in nature.

I also conclude that Schiro's statements to Ezell and White alluded to their efforts to seek Mason's reinstatement and that these statements were coercive. In essence, Schiro was making it clear to both of them that Babin would use his position and his influence to retaliate if they persisted in their efforts to support Mason. Such threats for engaging in dissident union activity violate the Act because union members have the right to engage in dissident union activity. *Laborers Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100 (1986).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices proscribed by Section 8(b)(1)(A) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, International Union of Operating Engineers, Local Union No. 406, AFL–CIO, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restraining and coercing union member-employees in the exercise of their rights under Section 8(b)(1)(A) of the Act by threatening them with reprisal for engaging in dissident union activity.

(b) Restraining and coercing union member-employees in the exercise of their rights under Section 8(b)(1)(A) of the Act by assaulting union member-employees for engaging in dissident union activity.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices and at any place where its meetings are customarily held copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice to the Regional Director for Region 15 for posting by Boh Brothers Construction Co., Inc., if willing, at all locations where notices to its employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges other violations under the Act, not specifically found here.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT restrain and coerce union member-employees in the exercise of their rights under Section 8(b)(1)(A) of the Act by threatening them with reprisal for engaging in dissident union activity.

WE WILL NOT restrain and coerce union member-employees in the exercise of their rights under Section 8(b)(1)(A) of the Act by assaulting union member-employees for engaging in dissident union activity.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 406